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No. 84-278

In The
Supreme Court of the United States
October Term, 1984

CLYDE F. STAGNER, d/b/a WEST ROUTE TRADING COMPANY,
Appellant,

v.

WYOMING STATE TAX COMMISSION AND STATE BOARD OF EQUALIZATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WYOMING

MOTION TO DISMISS OR AFFIRM

September, 1984

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CLYDE F. STAGNER, d/b/a WEST ROUTE TRADING COMPANY,

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WYOMING STATE TAX COMMISSION AND STATE BOARD OF EQUALIZATION,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WYOMING

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MOTION TO DISMISS OR AFFIRM

—o—

The Appellee moves the Court to dismiss the appeal herein or in the alternative, to affirm the judgment of the Supreme Court of Wyoming on the ground that it is manifest that Appellant lacks standing to prosecute this appeal and that the questions upon which the decision of the cause depends are so unsubstantial as not to require further argument.

—o—

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

The Statute

This appeal raises the question of the constitutionality of W.S. 39-6-106. That statute reads:

> (a) Any package of cigarettes found in this state without stamps, imprints or impressions affixed thereto as provided by this article are contraband goods and may be seized without a warrant by the board or any peace officer of this state when so directed by the board. This section does not apply to cigarettes in the original unopened shipping package in the possession of or in transit to a licensed wholesaler or to owners of cigarettes not willfully or intentionally evading the tax imposed by this article.
>
> (b) Cigarettes seized in accordance with subsection (a) of this section shall be sold by the board to a licensed wholesaler to the best advantage of the state. Proceeds from the sale shall be remitted to the state treasurer for deposit into the general fund. The licensed wholesaler purchasing the cigarettes shall pay taxes and affix stamps, imprints or impressions as provided by this article on cigarettes so purchased.

This statutory section was relied upon by Appellee to seize Appellant's unstamped cigarettes. No tax was being collected on sales of cigarettes by Appellant.

The Proceedings Below

Appellant sold cigarettes from a store located within the exterior boundaries of the Wind River Indian Reservation. Appellee insisted for many years that Appellant collect tax on cigarette sales to non-Indians. After Appellant informed Appellee that he would not collect the tax, a seizure took place on March 5, 1981. The Wyoming Supreme Court ultimately found that Appellant failed to diligently seek relief from this seizure. *Stagner v. Wyoming State Tax Commission*, 642 P.2d 1296 (Wyo. 1982). Appellant could have timely filed a petition for review and applied for a stay order on the sale pursuant to Rule 12.05 of the Wyoming Rules of Appellate Procedure. This first seizure is not reviewable by this appeal, is not a matter

of record herein, and was improperly raised by Appellant in the Jurisdictional Statement.

The Appellant never collected any taxes after the first seizure, although requested to do so. The Appellee therefore seized a second time, on June 9, 1982, because of Appellant's willful refusal to collect the tax. On June 10, 1982, the Appellant filed an action in the Wyoming District Court seeking declaratory and injunctive relief. The District Court entered an order adverse to Appellant on all issues on Aug. 9, 1983. An appeal was taken to the Wyoming Supreme Court which upheld the District Court. The supreme court entered its judgment and order on May 22, 1984. Appellant filed his Notice of Appeal to this Court on July 3, 1984.

A. The Appellant Lacks Standing To Bring An Appeal To This Court.

The Wyoming Supreme Court specifically found that since Appellant was notified of the seizure and was given an opportunity for a hearing, Appellant does not have standing to contend that W.S. 39-6-106 is unconstitutional for lack of procedural due process. As a result, the Wyoming Supreme Court did not address the issue of constitutionality for want of due process. This Court is not bound by the lower court's holding and must itself determine the matter of standing. *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959). The controlling question is whether Appellant has sustained or is immediately in danger of sustaining some direct injury as the result of the statute's enforcement. *Cramp v. Board of Public Instruction,* 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Massachusetts v. Mellon,* 262 U.S. 447, 67 L.Ed. 1078, 43 S.Ct. 597 (1923).

Appellant was not denied an opportunity for a hearing and in fact was offered administrative hearings which were rejected by Appellant. The administrative hearing was specifically provided in the notice of seizure which took place on June 9, 1982. This seizure notice was served on the carrier, Appellant's agent, on June 9 and was given to Appellant's counsel on June 10, 1982, immediately after seizure. The notice was not served directly upon Appellant, as the seizure occurred 150 miles from Appellant's business. The failure to serve the seizure notice was directly attributable to the fact that Appellant filed an action in State District Court on June 10, 1982, and the State District Court determined in open court, where Appellant was represented by counsel, that it would keep jurisdiction of the matter, preempting the offered administrative proceeding, and grant a hearing in District Court. Appellee did affirmatively set forth the seizure notice in its answer filed in District Court on June 28, 1982, App. pp. 1-7. The answer and seizure notice are part of the record in this case. Consequently, Appellant's footnote on page 4 is erroneous and misleading. The issue of whether the statute was being constitutionally administered was never raised nor tried by Appellant.

Appellant never sustained an injury by operation of the statute. In fact, Appellant received a prompt judicial hearing, and could have requested an administrative hearing or filed a petition for judicial review. *Stagner v. Wyoming State Tax Commission, supra.*

B. The Case Presents No Substantial Question Not Previously Decided By This Court.

This Court has previously decided that seizure of cigarettes enroute to an Indian reservation is permissible.

In *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 161, 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980), this Court held that:

> [A]lthough the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which the state has validly imposed.

The Appellant, as did the Tribes of Colville, continually refused to collect any tax even though requested to do so on numerous occasions. Appellant's behavior and attitude as repeatedly manifested to Wyoming tax officials necessitated the seizure action.

Appellant also maintains that since W.S. 39-6-106 fails to provide notice and opportunity for hearing, the statute is constitutionally infirm. The authority cited by Appellant is no longer the better reasoned law. This Court in *United States v. Raines,* 362 U.S. 17, 4 L.Ed.2d 524, 80 S.Ct. 519 (1960), held that the constitutionality of a statute should never be anticipated unless absolutely necessary and that the constitutionality should be limited to the precise facts presented.

The precise facts before this Court amply demonstrate that Appellant received a hearing the day following the seizure. Even though W.S. 39-6-106 contains no hearing requirement, the Wyoming Courts afforded Appellant complete procedural due process. The cigarettes were immediately returned to Appellant and he resold them and collected the tax. Such procedural due process afforded by the Wyoming Courts demonstrates that there is no substantial question of due process which this Court needs to address. *Jennings v. Mahoney,* 404 U.S. 25, 30 L.Ed.2d

146, 92 S.Ct. 180 (1971). Several other courts have followed this holding. *Wiren v. Eide,* 542 F.2d 757 (9th Cir. 1976); *State v. F/V Baranof,* 677 P.2d 1245 (Alaska 1984); *F/V American Eagle v. State,* 620 P.2d 657 (Alaska 1980).

There is no requirement that a hearing be afforded prior to seizure where there is an important governmental interest and there is a special need for prompt action. *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974). Certainly Wyoming had an interest in collecting its tax monies. The seizure was necessary as it was the only means to acquire jurisdiction over the property. As mentioned earlier, seizure has been sanctioned by this Court.

The Fourteenth Amendment due process clause requires an opportunity for a hearing at a meaningful time and in a meaningful manner. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982); *Armstrong v. Manzo,* 380 U.S. 545, 4 L.Ed.2d 62, 85 S.Ct. 1187 (1965). Prior to forfeiture, a meaningful judicial hearing was afforded to Appellant. A hearing within one day must certainly be regarded as being timely. Appellant was also provided an opportunity for an administrative hearing, App. pp. 5-6.

Appellant has also failed to present a substantial question under equal protection principles as he has not demonstrated that comparable or similar groups have been given more favorable treatment. *Ellis v. Dixon,* 349 U.S. 458, 99 L.Ed. 1231, 75 S.Ct. 850 (1955).

This Court—in a series of cases from *Washington v. Davis,* 426 U.S. 229 (1976) to *Rogers v. Lodge,* 458 U.S. 613 (1982)—has emphasized that the equal protection

clause can be violated only by purposeful discrimination. *General Building Contractors v. Pennsylvania,* 458 U.S. 375, 391 (1982). Appellant failed to allege and prove that either the Wyoming legislature or the Appellee enacted or administered W.S. 39-6-106 with the intent to purposefully discriminate against Indians.

———o———

CONCLUSION

WHEREFORE, Appellee respectfully submits that as Appellant lacks standing to present the issues and further because the questions presented are so unsubstantial as to not need further argument, Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Wyoming.

DATED this 17 day of September, 1984.

Respectfully submitted,

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Peter J. Mulvaney
Deputy Attorney General

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Attorney General
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APPENDIX

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

IN AND FOR LARAMIE COUNTY, STATE OF WYOMING

Civil No. 98-198

CLYDE F. STAGNER, d/b/a WEST ROUTE TRADING COMPANY,

Petitioner,

vs.

WYOMING STATE TAX COMMISSION AND STATE BOARD OF EQUALIZATION,

Respondent.

ANSWER

(Filed June 28, 1982)

COMES NOW Respondent, by and through the Attorney General and answers petitioner's petition for declaratory judgment as follows:

1. Admits each and every allegation contained within paragraphs 4, 6, 7, 8, 9 and 10 except states that it is without sufficient information or knowledge to form a belief as to the truth and veracity that the cigarettes were worth $3,400.00 and therefore denies the same.

2. States that it is without sufficient information or knowledge to form a belief as to the truth and veracity of those allegations contained within paragraphs 1, 2, 5 and 12 and therefore denies the same.

3. States that for purposes of this lawsuit the Respondent is considered the State of Wyoming pursuant to

W.S. 1-35-101 and therefore denies the allegations contained within paragraph 3.

4. Specifically denies each and every allegation contained within paragraph 11.

AFFIRMATIVE DEFENSE

Respondent affirmatively asserts that W.S. 39-6-106 is administered in such a manner as to afford due process and equal protection to any person whose cigarettes are seized. A notice of seizure and opportunity for hearing would have been served upon petitioner had this lawsuit not been instituted. Attached hereto and incorporated herein and made a part of these pleadings is the copy of the seizure notice.

AFFIRMATIVE DEFENSE

Respondent affirmatively asserts that petitioner is wilfully evading the cigarette tax in Wyoming in that he has been notified by respondents that sales of cigarettes to non-Indians were subject to Wyoming excise tax. Moreover, respondents did seize petitioner's cigarettes in March of 1981 and petitioner knew at that time that respondent wanted sales of ciragettes to non-Indians subjected to the excise tax imposed by W.S. 39-6-103.

AFFIRMATIVE DEFENSE

Respondent affirmatively asserts that W.S. 39-6-106 allows seizure of unstamped cigarettes. That petitioner has incorrectly interpreted this section by alleging that Title 39, Article 6 does not require cigarettes in unopened shipping packages be affixed with stamps. Only a licensed wholesaler can receive unstamped cigarettes pur-

suant to that section and petitioner refuses to license. Respondent is not requiring petitioner to pay any license fee. Respondent is entitled to make seizures whenever the cigarettes are destined to be sold to non-Indians without affixation of stamps or collection of the tax. That petitioner has admitted that he sells cigarettes to non-Indians. The license is only required as a means for respondent to effectively administer sales to non-Indians.

AFFIRMATIVE DEFENSE

Respondent affirmatively asserts that it is immune from suit involving damages and costs of litigation.

WHEREFORE RESPONDENT PRAYS:

1. That the court find that the incidence of the cigarette tax is upon the purchaser.

2. That the court find that W.S. 39-6-106 is constitutionally administered.

3. That the court find that sales of cigarettes to non-Indians are subject to the tax imposed by W.S. 39-6-103.

4. That the court find that respondent is immune from suit for costs.

5. That the court find that Indians are not being discriminated against by enforcement of Wyoming's cigarette tax statutes.

6. For such other and further relief as the court deems just and equitable in this action.

STATE BOARD OF EQUALIZATION

By: /s/ Ron Arnold
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Ron Arnold, do hereby certify that on this 28th day of June, 1982 the foregoing Answer was served by placing true and correct copies in the United States mail, postage prepaid to:

David Marion and
Carol Herman
Wind River Legal Services, Inc.
P.O. Box 247
Ft. Washakie, Wyoming 82514

/s/ Ron Arnold

IN THE MATTER OF THE WYOMING STATE TAX COMMISSION AND STATE BOARD OF EQUALIZATION

vs.

Clyde Stagner d/b/a
West Route Trading Co.
P.O. Box 821, Hwy 26
Riverton, WY 82501

Salt Creek Freightways
P.O. Box 39
Casper, WY 82602

Powers Candy Co., Inc.
P.O. Box 4338
602 S. First Avenue
Pocatello, ID 83201

NOTICE OF SEIZURE AND OPPORTUNITY FOR HEARING

(Filed June 7, 1982)

Notice is hereby given that cigarettes not bearing evidence of tax payment pursuant to W.S. 39-6-103, consigned to West Route Trading Company, shipped by Powers Candy Company, Inc., via Salt Creek Freightways, have been found in this state. W.S. 39-6-106 provides that any package of cigarettes found in this state without stamps, imprints or impressions affixed thereto as provided by W.S. 39-6-101 thru 39-6-110 are contraband goods and may be seized without a warrant by the State Board of Equalization.

Notice is hereby given that a shipment of contraband cigarettes consigned, shipped and found or described above,

are hereby seized as contraband by the State Board of Equalization as provided by W.S. 39-6-106.

You are further notified that any of the above named parties may request a hearing before the State Board of Equalization regarding the matter of the seizure of contraband cigarettes, by written request, which must be addressed to and received by the Board of Equalization at 2200 Carey Avenue, Cheyenne, Wyoming 82002, within fifteen (15) days of the date of service of this Notice. If a request for hearing is timely received, a hearing will be conducted in compliance with the Wyoming Administrative Procedures Act and Chapters XX and XXI of the Rules and Regulations of the Department of Revenue and Taxation, as a contested case before the Board of Equalization.

Further, if any party requests a hearing, he may request a stay of disposition of the proceeds of sale of the property seized hereunder until the hearing and decision thereon, and that the proceeds received by the Board will be held in a trust account pending a decision by the Board following the hearing.

Dated this 1 day of June, 1982.

WYOMING STATE TAX COMMISSION AND
STATE BOARD OF EQUALIZATION

ATTEST:

/s/ R. A. Hakala, Chairman

.....
Secretary

/s/ Rudolph Anselmi, Deputy Chairman

/s/ Doran A. Lummis, Member

STATE OF IDAHO)
COUNTY BANNOCK)

I, ..., an employee of the Bannock County Sheriff's Dept. Pocatello, Idaho, do hereby certify that I received the within Notice of Seizure and that I served the same in the county aforesaid on this 9th day of June, 1982, by delivering a copy of same to Dave Powers, President of Powers Candy.

/s/ James Davis, Deputy Sheriff

I hereby certify that I served the foregoing Notice of Seizure and Opportunity for Hearing on the defendant on the 9th day of June, 1982, by delivering a true and correct copy thereof to: Dave Powers, President.

/s/ James Davis, Deputy Sheriff